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US DISTRICT COURT
DISTRICT OF ALASKA

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Inc., and USF&G, Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA for the)
use of NORTH STAR TERMINAL &)
STEVEDORE COMPANY, d/b/a NORTHERN)
STEVEDORING & HANDLING, and NORTH)
STAR TERMINAL & STEVEDORE COMPANY,)
d/b/a Northern Stevedoring &)
Handling, on its own behalf,)

No. A98-009 CIV (HRH)

Plaintiffs,)

and)

UNITED STATES OF AMERICA for the)
use of SHORESIDE PETROLEUM, INC.,)
d/b/a Marathon Fuel Service, and)
SHORESIDE PETROLEUM, INC., d/b/a)
Marathon Fuel Service, on its own)
behalf,)

Intervening Plaintiffs,)

and)

METCO, INC.,)

Intervening Plaintiff,)

vs.)

NUGGET CONSTRUCTION, INC.; SPENCER)
ROCK PRODUCTS, INC.; UNITED)
STATES FIDELITY AND GUARANTY)
COMPANY; and ROBERT A. LAPORE,)

Defendants.)

DEFENDANT NUGGET
CONSTRUCTION, INC.'S
MEMORANDUM IN OPPOSITION
TO PLAINTIFF AND USE-
PLAINTIFF NORTH STAR
TERMINAL AND STEVEDORING
COMPANY'S MOTION TO
COMPEL DISCOVERY

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1 Defendant Nugget Construction, Inc. ("Nugget") submits
2 this memorandum in opposition to Plaintiff and Use-Plaintiff
3 North Star Terminal and Stevedoring Company's ("North Star")
4 Motion to Compel Discovery.
5

6 I. NUGGET'S FINANCIAL CONDITION
7

8 A. North Star's Discovery Requests are Overly Broad and Unduly
9 Burdensome

10 North Star is engaging in a costly and disruptive
11 fishing expedition of Nugget's privileged, confidential, and
12 proprietary financial information. Through its discovery
13 requests, North Star seeks to know all Nugget financial
14 information from 1996 to present, i.e., asset, property and
15 account receivables, financial and tax statements, total gross
16 net income, gross revenue, pre-tax profit, equity per year. See
17 attached Exhibit A, Nugget's Responses to North Star's First Set
18 of Discovery Requests, pp. 14-23. The burden of these discovery
19 requests and the intrusiveness into Nugget's financial affairs
20 is both enormous and unwarranted.
21

22 Nugget opposes North Star's motion to compel the
23 discovery of Nugget's financial condition. North Star's basis
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1 for obtaining Nugget's financial information is the remote
2 possibility of obtaining a punitive damages award. However,
3 North Star has provided absolutely no evidence to meet the clear
4 and convincing standard under either the pre-1997 or post-1997
5 punitive damages statute to warrant the discovery of Nugget's
6 financial information.
7

8 The Court should restrain North Star's unfettered
9 probing into Nugget's financial information. Fed. R. Civ.
10 P. 26(b)(1) provides in pertinent part that "[p]arties may
11 obtain discovery regarding any matter, not privileged, that is
12 relevant to the claim or defense of any party" The 2000
13 changes to Rule 26(b)(1) narrowed the scope of discovery to
14 allow the discovery of unprivileged facts "relevant to the claim
15 or defense of any party," as opposed to the prior rule allowing
16 discovery of facts "relevant to the subject matter involved in
17 the pending action." Additionally, Fed. R. Civ. P. 26(b)(2)
18 provides that the Court may limit discovery to the extent that
19 discovery requests do not meet the relevancy standard or are
20 unreasonably cumulative, duplicative, burdensome, or expensive.
21
22 North Star's discovery regarding Nugget's financial condition
23

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1 clearly are unreasonably burdensome given the narrow basis upon
2 which North Star's motion rests.

3
4 B. A Prerequisite Showing of Liability for Punitive Damages is
5 Required Before Pretrial Discovery of Financial Information
6 is Allowed.

7 At the time North Star asserted its claims for
8 punitive damages, the Alaska punitive damages statute, effective
9 August 7, 1997, limited the circumstances under which evidence
10 of a defendant's financial condition could be discovered and
11 admitted. See AS 09.17.020. Since North Star's punitive
12 damages claim accrued after August 7, 1997,¹ the post-1997
13 punitive damages statute applies in this case. That statute
14 expressly authorized a bifurcation of the liability and punitive
15 damages phases of trial. Thus, the evidence of a defendant's
16 wealth is not discoverable or admissible until *after* the trier
17 of fact has determined the defendant's liability for punitive
18 damages. The Legislature made it explicitly clear that *prima*
19

20
21 ¹ North Star did not assert its punitive damages claim until August 31, 2005.
22 Presumably, North Star was unaware of the existence of these claims until
23 shortly before that time, otherwise they would be time barred if North Star
24 was aware of the punitive damages claims at the time of initial filing yet
25 failed to assert such claims. Consequently, given North Star's presumed lack
of knowledge of the basis for such claims, North Star's right to assert a
punitive damages claim did not arise until after the 1997 amendments.

1 facie proof of a defendant's liability for punitive damages is
2 required before a defendant's wealth or financial condition may
3 be discovered. See generally AS 09.17.020 and specifically
4 AS 09.17.020(e).

5
6 North Star suggests that the statute allows for the
7 discovery of a defendant's wealth prior to the finding of
8 punitive damages liability. On the contrary, the statute
9 unambiguously provides that "**discovery** of evidence that is
10 relevant to the amount of punitive damages to be determined
11 under (c)(3) or (6) of this section **may not be conducted until**
12 **after** the fact finder has determined that an award of punitive
13 damages is allowed" Further, North Star's concerns that
14 post-discovery of a defendant's wealth would lead to absurd
15 results is unfounded. The statute directly addresses this
16 concern by providing that
17

18
19 the court may issue orders as necessary,
20 including directing the parties to have the
21 information relevant to the amount of
22 punitive damages to be determined under
23 (c)(3) or (6) of this section available for
24 production **immediately at the close of the**
25 **initial trial** in order to minimize the delay
between the initial trial and the separate

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1 proceeding to determine the amount of
2 punitive damages.

3 Moreover, consideration of the financial condition of
4 a party is a relevant factor in a claim for punitive damages
5 only *after* the plaintiff proves by clear and convincing evidence
6 that the wrongdoer's conduct was outrageous. In *Sturm, Ruger &*
7 *Co., Inc., v. Day*, 594 P.2d 38, 46-49 (Alaska 1979), overruled
8 on other grounds, *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska
9 1985), the court found that punitive damages were awardable in a
10 strict liability case if a plaintiff met the clear and
11 convincing evidentiary standard. The court considered the
12 wealth of a defendant as a relevant factor that bears on the
13 excessiveness of a punitive damages award *only after* sufficient
14 evidence sustained a jury's award of punitive damages. *Id.* at
15 47-48. Hence, there is no reason why North Star should have
16 discovery of Nugget's financial condition until after the trier
17 of fact has determined if punitive damages are appropriate.
18
19

20 North Star cites cases in its motion to justify
21 obtaining Nugget's privileged, confidential, and proprietary
22 financial information that fail to address the clear limitation
23

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1 on discovery of financial information contained in the
2 applicable Alaska statute. Moreover, North Star misconstrues
3 the punitive damages discussion in *Norcon Inc. v. Kotowski*, 971
4 P.2d 158, 173-177 (Alaska 1999). The *Norcon* court dealt with
5 the issues of whether there was sufficient evidence to present
6 the question of punitive damages to the jury, and whether the
7 jury's award of punitive damages was excessive and required
8 remittitur. *Id.* at 173. The jury had already rendered a
9 verdict on punitive damages before the court allowed the jury to
10 consider the amount of the award. Thus, the defendant's
11 financial condition as discussed in *Norcon* was a factor to be
12 considered *after* the defendant was found liable for punitive
13 damages.
14

15
16 The pre-1997 and post-1997 punitive damages statute
17 requires a prerequisite showing of liability before
18 consideration of financial information is allowed. Thus, the
19 Court should deny North Star's motion to compel Nugget's
20 financial information based on the unequivocal language of the
21

22
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1 punitive damages statute and to promote the legislative intent
2 of the statute.²

3
4 C. North Star Has Not Shown Prejudice

5 North Star asserts that the pre-1997 punitive damages
6 statute is applicable in this lawsuit because the accrual date
7 of North Star's state law claims occurred prior to August 7,
8 1997. However, North Star's argument ignores that its punitive
9 damages claims were filed well after AS 09.17.020 went into
10 effect. North Star's contention of the inapplicability of the
11 post-1997 statute is misplaced since its state law actions
12 accrued after August 7, 1997, as pointed out above.
13

14
15 Furthermore, even if the Court did not apply
16 AS 09.17.020, North Star has failed to make any showing of any
17 need to learn of Nugget's financial conditions at this point in
18 time. Other than for purposes of evaluating an appropriate
19

20 ² The legislative intent of the 1997 amendment further supports the
21 interpretation of the punitive damages statute: to provide for reasonable,
22 but not excessive, punitive damage awards against tortfeasors sufficient to
23 deter conduct and practices that harm innocent Alaskans while not hampering a
24 positive business environment by allowing excessive penalties. (Am § 10 ch
25 26 SLA 1997, Section 1, paragraph (2)). Further, Chapter 26, Section 48
provides that AS 09.17.020(e) has the effect of amending Rule 26, Alaska
Rules of Civil Procedure, by limiting discovery in certain actions.

1 penalty if punitive damages are imposed, North Star wants
2 Nugget's financial information to ascertain Nugget's ability to
3 satisfy a judgment in this case and contends that it is worried
4 about Nugget's financial resources being dissipated. See North
5 Star's Motion to Compel, p. 8 of 12. North Star fails to cite
6 any law that renders financial information discoverable to
7 assist a party in preparing for the future collectability of a
8 judgment. The purpose of pretrial discovery is to prepare for
9 trial of issues, not to uncover assets that might be applied
10 toward the satisfaction of a judgment. See *Clauss v. Danker*,
11 264 F. Supp. 246 (S.D.N.Y. 1967).
12
13

14 North Star also seeks Nugget's financial information
15 to evaluate the case's settlement value. See North Star's
16 Motion to Compel, p. 8 of 12. North Star's discovery of
17 Nugget's wealth is irrelevant to settlement and is not an
18 appropriate basis for seeking discovery. Moreover, Nugget has
19 continuously maintained that North Star's claims are spurious
20 and unsubstantiated. The discovery of Nugget's financial
21 resources absent actual factual basis for the award of punitive
22 damages would unnecessarily invade Nugget's confidential and
23

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1 proprietary rights. Therefore, there is absolutely no need for
2 North Star to engage in the pretrial discovery of Nugget's
3 financial conditions.
4

5 North Star's requests for Nugget's financial
6 information are premature and unnecessary at this time. North
7 Star will not be prejudiced if it obtains such information after
8 the liability phase of trial. The Court can allow the parties
9 to engage in expedited discovery on North Star's punitive damage
10 claims, including information related to Nugget's wealth and
11 financial condition, before resuming trial on the punitive
12 damage claims. Such an approach saves the judicial system time,
13 and preserves the confidential and proprietary rights of Nugget.
14

15 II. NUGGET'S INSURANCE INFORMATION
16

17 A. Insurance and Indemnity Agreements
18

19 North Star moves to compel the production of Nugget's
20 insurance agreements. Nugget does not dispute Federal Civil
21 Rule 26(a)(1)(D) allows for the inspection and copying of
22 insurance agreements that may be liable to satisfy part or all
23 of a judgment. However, this is a claim for economic loss, not
24

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1 property damage, personal injury, or wrongful death.
2 Consequently, there are not any insurance policies that apply to
3 this type of claim.
4

5 Nugget indicated in its Rule 26(a)(1)(D) disclosure
6 that it has no insurance agreement applicable to North Star's
7 Miller Act or state law claims. Nugget also revealed in its
8 discovery responses that there are no documents referencing any
9 insurance agreement pertinent to North Star's claims. In
10 effect, Nugget does not possess any agreement or policy under
11 which an insurance business may be liable to satisfy any
12 judgment which might be entered against it in this case. The
13 federal rules do not require Nugget to produce more than it has
14 already provided pursuant to its mandatory disclosure
15 obligation. The federal rules also do not entitle North Star to
16 scrutinize all insurance agreements that Nugget may have in
17 order to make its own determination regarding potential
18 coverage.
19
20

21 Nevertheless, John Smithson testified on behalf of
22 Nugget that he would confirm with Nugget's insurance carrier
23 whether any policies dating back from 1997 might provide

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1 coverage to the Homer Spit Project. See Attached Exhibit B,
2 p. 81, lines 13-22. Nugget's counsel also agreed that any
3 insurance policies or agreements which might cover North Star's
4 allegations will be forwarded to North Star's counsel. See
5 Attached Exhibit B, p. 79, lines 18-25; p. 80, lines 1-13.
6 Moreover, when Nugget made its Fed. R. Civ. P. 26(a)(1)(D)
7 Second Supplemental Disclosures on October 26, 2005, and
8 responded to North Star's discovery requests on November 8,
9 2005, that to the best of Nugget's knowledge and belief at those
10 times, there were no known insurance agreements that would cover
11 North Star's numerous claims. Nugget specifically stated that
12 it would supplement its responses should new or different
13 information become known through discovery. However, to date,
14 North Star has failed to develop a basis why Nugget's insurance
15 policies would provide coverage for the claims asserted by North
16 Star.
17
18

19
20 B. Other Insurance Information and Documents

21 Although Nugget agrees to disclose any applicable
22 insurance agreements, Nugget contests the disclosure requested
23 in North Star's overbroad and sweeping demand for "any
24

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1 information and documents regarding Nugget claims against
2 insurance." See North Star's Motion to Compel, page 11 of 12,
3 lines 14-15. North Star is not entitled to any of Nugget's
4 insurance information and documents, including "claims against
5 insurance," to the extent they contain personal and financial
6 information or have no relation to the claims and defenses
7 asserted in this case. The Advisory Committee Notes on Fed. R.
8 Civ. P. 26(b)(2) clearly state the limitations on the disclosure
9 of insurance coverage: that insurance should be distinguished
10 from any other facts concerning a defendant's financial status:
11 (1) because insurance is an asset created specifically to
12 satisfy the claim; (2) because the insurance company ordinarily
13 controls the litigation; (3) because the information about
14 coverage is available only from defendant or his insurer; and
15 (4) because disclosure does not involve a significant invasion
16 of privacy.
17
18

19 Further, the Advisory Committee comments that "the
20 insurance application may contain personal and financial
21 information concerning the insured, discovery of which is beyond
22 the purpose of this provision," and that "in no instance does
23

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1 disclosure make the facts concerning insurance coverage
 2 admissible in evidence." See also Fed. R. Evid. 411.³ As North
 3 Star correctly points out, Fed. R. Civ. P. 26(a)(1)(D) replaces
 4 subdivision (b)(2) of Rule 26, but such change does not signify
 5 any change of law. See North Star's Motion to Compel, page 9 of
 6 12. As such, North Star's discovery of Nugget's insurance
 7 information should be limited so as to prevent North Star from
 8 invading Nugget's confidential personal and financial
 9 information. Nugget requests the Court deny North Star's
 10 efforts to obtain insurance information beyond that which is
 11 allowed under the federal rules.
 12

13
 14 C. Deposition Testimony of Insurance Information

15 In addition, Nugget requests the Court to reject North
 16 Star's demand to depose Nugget's insurance agent and John
 17 Terwilliger as part of Nugget's continuing 30(b)(6) deposition.
 18 First, nowhere in the federal rules is Nugget required to offer
 19

20
 21 ³ Federal Rule of Evidence 411: Liability Insurance: Evidence that a person
 22 was or was not insured against liability is not admissible upon the issue
 23 whether the person acted negligently or otherwise wrongfully. This rule does
 24 not require the exclusion of evidence of insurance against liability when
 25 offered for another purpose, such as proof of agency, ownership, or control,
 or bias or prejudice of a witness.

1 the insurance carrier, its agents, employees, or representatives
2 to testify as Nugget's 30(b)(6) designee. The rule is clear and
3 simple: where a 30(b)(6) notice is propounded on a private
4 corporation, "the organization so named shall designate one or
5 more officers, directors, or managing agents, or other persons
6 who consent to testify on its behalf" The insurance
7 agent is not an officer, director, or managing partner of Nugget
8 and has no corporate affiliation with Nugget by any stretch of
9 the imagination. If North Star seeks Nugget's insurance agent
10 to testify on Nugget's insurance matters, then it has other
11 available means to procure the testimony, i.e., Fed. R. Civ.
12 P. 30(a)(1) or 31(a)(1).
13

14
15 Second, even if Nugget could offer John Terwilliger as
16 a 30(b)(6) deponent, Mr. Terwilliger's deteriorating health
17 conditions continue to hinder his availability and capacity to
18 testify in this case. North Star's callous insistence on
19 Mr. Terwilliger's testimony blatantly ignores his vulnerable
20 state of health. Should North Star continue to persist on
21 Mr. Terwilliger's testimony, then Nugget will seek a protective
22 order under Fed. R. Civ. P. 26(c) and seek sanctions under Fed.
23

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1 R. Civ. P. 37(a)(4). And should the Court require Nugget to
2 produce a deponent to testify on its insurance matters, Nugget
3 requests that the Court limit the testimony to the remaining
4 time allowed for North Star's recommencement of its 30(b)(6)
5 deposition so as not to exceed the seven (7) hour maximum
6 afforded under Fed. R. Civ. P. 30(d)(2).
7

8 III. EXPENSES INCURRED IN OPPOSING NORTH STAR'S
9 MOTION TO COMPEL AND CONCLUSION

10 Pursuant to Fed. R. Civ. P. 37(a)(4)(B), Nugget
11 requests that it be awarded its reasonable costs and expenses
12 incurred in opposing North Star's Motion to Compel. In the
13 alternative, should the court grant in part or deny in part
14 North Star's motion, that the court "apportion the reasonable
15 expenses incurred in relation to the motion among the parties
16 and persons in a just matter" pursuant to Federal Rule of Civil
17 Procedure 37(a)(4)(C). For all the foregoing reasons, the Court
18 should deny North Star's Motion to Compel Discovery and award
19 Nugget its reasonable costs expended on opposing North Star's
20 motion.
21
22
23
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1 Dated: December 27, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2005, a true and correct copy of the foregoing was mailed/hand delivered, as indicated, to:

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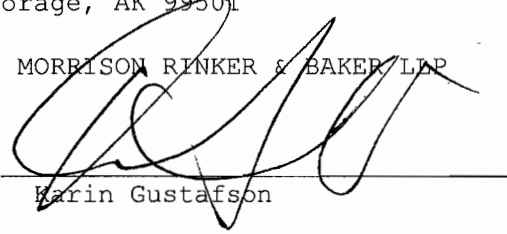
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